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No. 95-60

In the Supreme Court of the United States

OCTOBER TERM, 1995

ALBERT G. BUSTAMANTE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the evidence showed that petitioner received an illegal gratuity, with knowledge of the donors' illicit purpose for providing the gratuity.

2. Whether the gratuity statute, 18 U.S.C. 201(c)(1)(B), and its statutory antecedent, 18 U.S.C. 201(g) (1982), require proof of a quid pro quo.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-33) is reported at 45 F.3d 933.

JURISDICTION

The judgment of the court of appeals was entered on February 13, 1995. A petition for rehearing was denied on April 5, 1995. Pet. App. 34-35. The petition for a writ of certiorari was filed on July 5, 1995 (the day following a legal holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Western District of Texas, petitioner was convicted of conducting the affairs of an enterprise through a pattern of racketeering activity, in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962(c), and of accepting an illegal gratuity, in violation of 18 U.S.C. 201(g) (1982) and its successor, 18 U.S.C. 201(c)(1)(B).[1] He was sentenced to 42 months' imprisonment, to be followed by two years' supervised release, and ordered to pay a $55,000 fine. The court of appeals affirmed. Pet. App. 1-33.

1. The evidence at trial showed that petitioner, a Member of Congress from 1984 to 1992, received an illegal gratuity in the form of a no-risk investment in a Texas corporation that was seeking a license to operate a television station. Pet. App. 2, 10-13.[2]

After petitioner won the primary election in 1984, he was unopposed in the general election, so his seat in the House of Representatives was virtually assured. Pet. App. 10. In the interim between the primary and the general election, petitioner was invited by two friends, Oliver S. Heard and R. Lawrence Macon, to participate in a new company, San Antonio

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[1] Petitioner was acquitted of RICO conspiracy (18 U.S.C. 1962(d)), and of seven other counts of receiving unlawful gratuities. Pet. App. 2.

[2] Petitioner's violation of the gratuity statute constituted one of the two predicate acts that formed the basis for his RICO conviction. Petitioner no longer contests the lower courts' findings respecting the other predicate act—acceptance of a $35,000 bribe in exchange for his attempt to influence the award of a military food services contract. See Pet. App. 4-10.

Video Corporation (SAVC), which had been formed to compete for a Federal Communications Commission (FCC) license for a new television broadcasting station. *Ibid.* Petitioner was expected to make an initial contribution of $15,000, which would entitle him to 16% of the company's non-voting stock. *Id.* at 11. If SAVC won the FCC license, petitioner would have been expected to make a further payment of $650,000, as his share of the station's start-up cost. *Ibid.* Heard and Macon intended, however, that SAVC would borrow the money needed for start-up, using the FCC license as collateral, and then lend the funds to those investors (like petitioner) who did not have the capital to make their secondary contributions. *Ibid.*

Petitioner, however, lacked even the $15,000 needed to make his initial capital contribution. Pet. App. 11. In April 1985, he therefore applied for a loan from Groos Bank in San Antonio, Texas. *Ibid.* According to bank documents, Heard served as guarantor for the loan, which was issued as the result of his specific request. *Ibid.* Three days earlier, the bank had made petitioner another $20,000 loan, also procured as a result of Heard's specific request and financial guaranty. *Id.* at 11-12.[3]

Petitioner failed to make the loan installment payments that were due in 1986, 1987, and 1988, but Groos Bank nonetheless allowed him to renew the loan in April 1988, in reliance on Heard's original guaranty. Pet. App. 12. At that time, petitioner took

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[3] In May 1985, in the course of hearings respecting the FCC's licensing determination, petitioner testified that he had obtained a loan to make his initial stock purchase, but denied that Heard had guaranteed the loan. Pet. App. 12.

out another loan to cover the interest that had accrued on the original loan. *Ibid.* The new loan was also covered by the Heard guaranty. *Ibid.* In July 1988, petitioner consolidated the two SAVC-related loans into a single $20,140.69 obligation, which was also backed by Heard's guaranty. *Ibid.* Petitioner made only two of the scheduled monthly payments on the consolidated loan. *Ibid.*

SAVC was not ultimately awarded the FCC license, but it received, in October 1988, a $175,000 settlement from the successful licensee. Pet. App. 12. On October 27, just three days after SAVC received that payment, Heard issued to petitioner a check for $19,467.53, the exact amount then outstanding on petitioner's bank loan. *Id.* at 12-13. SAVC's other investors did not receive similar treatment. Instead, they were notified that the money received in settlement would be applied first to pay off SAVC's outstanding bills, and that any remaining capital would be distributed pro rata. *Id.* at 13.[4]

2. Petitioner argued on appeal that the evidence failed to prove (i) that he knew of Heard's loan guaranty or (ii) that the Groos Bank loan was in fact risk-free. The court of appeals rejected those contentions, explaining that petitioner "was not merely accused of accepting these particular guarantees and promises, but of allowing Macon and Heard to shoulder the responsibility for his SAVC investments from start in 1984 to finish in 1988." Pet. App. 14. The prosecution was not, therefore, required to prove that the Groos Bank loan was risk-free; rather, "[t]he govern-

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[4] The record does not disclose whether the other shareholders received any of the settlement proceeds. Pet. App. 13.

ment was required to prove what it alleged—a risk-free investment carry." *Id.* at 15. Viewing the indictment in that light, the court concluded that there was ample evidence from which the jury could have found that petitioner knew that Heard and Macon provided him with a risk-free investment in SAVC. *Ibid.* It found particularly notable petitioner's receipt from SAVC of the precise amount of money that he needed to repay his bank loan (an amount that exceeded his actual investment), at a time when SAVC was not repaying its other investors. *Ibid.*

The court also rejected petitioner's suggestion (Pet. C.A. Br. 16 n.10) that conviction for receipt of a gratuity requires proof that the gratuity was given in exchange for an official act. Pet. App. 13, 16. It explained: "Generally, no proof of a quid pro quo is required; it is sufficient for the government to show that the defendant was given the gratuity simply because he held public office." *Id.* at 13 (citing *United States* v. *Evans*, 572 F.2d 455, 479 (5th Cir.), cert. denied, 439 U.S. 870 (1978)). Noting (Pet. App. 16) that petitioner brought no broadcasting experience to SAVC; that petitioner's Hispanic ethnicity was not the basis for SAVC's claim to a minority preference; and that petitioner "certainly added no financial strength to the venture," and considering (*ibid.*) that Heard's firm called on petitioner to assist it in his official capacity,[5] the court concluded that "the jury

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[5] In May 1985, Heard, whose firm specialized in collecting delinquent taxes for local governments, sought petitioner's assistance in obtaining a multi-million dollar contract from the City of San Antonio. Petitioner lobbied for Heard with the city council, and Heard's firm obtained the contract. Gov't C.A.

was entitled to find that Heard and Macon sustained [petitioner] because he was a member of the United States Congress." *Id.* at 16.[6]

ARGUMENT

1. Petitioner argues (Pet. 12-22) that the court of appeals erroneously held that the federal gratuity statute does not require proof that the recipient of a gratuity knew that he received the gratuity because of his official position. We agree with petitioner that the statute requires such a showing. As this Court indicated with respect to 18 U.S.C. 201(g) (1982) (the predecessor to 18 U.S.C. 201(c)(1)(B)), the government has the burden of demonstrating the recipient's "knowledge of the alleged briber's illicit reasons for paying the money." *United States* v. *Brewster*, 408 U.S. 501, 527 (1972).[7] The court of appeals in this case did not hold to the contrary.

Br. 12, 16. In April 1989, less than six months after SAVC issued the check to petitioner that allowed him to pay off his loans, Heard's firm obtained petitioner's assistance in an effort to amend a federal statute that exempted federal banking agencies and credit unions from local property taxes. *Id.* at 19.

[6] The court of appeals also rejected numerous other challenges to petitioner's conviction, and petitioner has not renewed those challenges here.

[7] Section 201(c)(1)(B) subjects to criminal liability any "public official, former public official, or person selected to be a public official, [who,] otherwise than as provided by law for the proper discharge of official duty, directly or indirectly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally for or because of any official act performed or to be performed by such official or person." 18 U.S.C. 201(c)(1)(B). Its statutory precursor, 18 U.S.C. 201(g) (1982), was substantively identical.

The district court correctly instructed the jury that, to convict, it must find that petitioner "demanded, sought, received, accepted, * * * or * * * [agreed] to accept something of value personally," that he "did so, for, and because of an official act performed and to be performed by the defendant," and that he "sought or accepted the thing of value, knowingly and purposely, and not through misunderstanding, inadvertence or some other innocent reason." 16 R. 44-45. The court further stated that the jury should acquit if it were to find that "[t]he gratuities * * * were accepted in payment of professional services or as a matter of friendship or for social purposes only." *Id.* at 45. Petitioner did not contend on appeal that the instructions failed to require proof of scienter. Nor did he challenge the sufficiency of the evidence of his state of mind with respect to Heard's and Macon's reasons for providing him a no-risk investment.[8] Rather, as noted, petitioner argued only (1) that the bank loan was not risk free, (2) that he had no knowledge of Heard's guaranty, and (3) that the gratuity statute requires proof of a quid pro quo. The court of appeals thus had no reason to (and did not) address the adequacy of the government's proof of petitioner's knowledge respecting Heard's and Macon's motivations.

Petitioner relies, for his contrary characterization of the decision below, on a passage in which the court concluded that "it is sufficient for the government to show that the defendant was given the gratuity

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[8] Petitioner raised his challenge to the sufficiency of the evidence for the first time in his petition for rehearing, but did not challenge the jury instructions regarding scienter.

simply because he held public office." Viewed in context, that statement was merely a rejection of petitioner's claim that the government was required to prove a quid pro quo:

> To find a public official guilty of accepting an illegal gratuity, a jury must find that the "official accepted, because of his position, a thing of value 'otherwise than as provided by law for the proper discharge of official duty.'" Generally, no proof of a quid pro quo is required; it is sufficient for the government to show that the defendant was given the gratuity simply because he held public office. In addition, the jury need not find that the official accepted the gratuity with the intent to be influenced. The jury must only conclude that the evidence establishes beyond a reasonable doubt that the official accepted unauthorized compensation.

Pet. App. 13 (citations omitted). Because the issue was not raised by petitioner, the court did not purport to address the distinct question whether proof is required of the recipient's knowledge respecting the donor's intent.

To the extent that the decision below is interpreted to say anything about that issue, the court's reliance on its prior decision in *United States* v. *Evans*, *supra*, is instructive. In *Evans*, the court of appeals recognized that the government must prove that the defendant "accepted, because of his [official] position, a thing of value 'otherwise than as provided by law for the proper discharge of official duty.'" 572 F.2d at 480. It concluded, on the facts of that case, that "[t]he jury was well justified in concluding that Evans accepted the money and favors with knowledge that

the payments were made because of his official position." *Id.* at 482. The court in this case did not call into question that analysis.

2. Petitioner's challenge to the sufficiency of the evidence supporting his knowledge that he had been afforded a risk-free investment because of his official position is not properly raised for the first time in a petition for certiorari. See *United States* v. *Mendenhall*, 446 U.S. 544, 551 n.5 (1980). But even if the issue were fairly presented, it does not warrant this Court's review, because the evidence was sufficient to permit a rational trier of fact to find the elements of the offense beyond a reasonable doubt. *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979).

The evidence demonstrated that Heard and Macon provided petitioner with a risk-free investment from 1984-1988; that petitioner was invited to invest after his seat in Congress was assured; that petitioner brought no broadcasting experience, financial strength, or other unique attributes to the venture; and that, during the pendency of the investment, Heard's firm called on petitioner to assist them in his official capacity. The court of appeals found that evidence sufficient to demonstrate that "Heard and Macon sustained [petitioner] throughout his SAVC investment because he was a member of the United States Congress." Pet. App. 16. The evidence equally supports the inference that petitioner knew why he was receiving the no-risk investment.

3. Petitioner argues (Pet. 22-27) that the government is required to prove a quid pro quo under the gratuity statute, at least where (as here) the defendant is an elected official. He relies, for that proposition, on *McCormick* v. *United States*, 500 U.S. 257

(1991). Petitioner acknowledges (Pet. 27) that *McCormick* involved a prosection for extortion under the Hobbs Act, and that its holding "was expressly limited to an elected official's conduct vis-a-vis campaign contributions." He contends (Pet. 27), however, that the Court's reasoning in *McCormick* supports adoption of a quid pro quo requirement for prosecutions of elected officials, outside of the context of campaign contributions, under the federal gratuity statute.

The holding in *McCormick* reflected the Court's perception that Congress did not intend to subject to criminal liability a legislator who "act[s] for the benefit of constituents or support[s] legislation furthering the interests of some * * * constituents, shortly before or after campaign contributions are solicited and received from those beneficiaries." *McCormick*, 500 U.S. at 272. "To hold otherwise," the Court explained, "would open up to prosecution not only conduct that has long been thought to be well within the law but also conduct that in a very real sense is unavoidable so long as election campaigns are financed by private contributions or expenditures." *Ibid.* Although the Court did not hold that Congress lacked the power to enact such a criminal statute, it concluded that judicial recognition "would require statutory language more explicit than the Hobbs Act contains." *Id.* at 272-273.

The Court's concern with disrupting the nation's system of private campaign finance is not implicated in cases, like this, in which the elected official has been provided a purely personal benefit. Moreover, the text of Section 201(c)(1)(B) does not support the imposition of a quid pro quo requirement. The

statute (like its predecessor, Section 201(g)) subjects to criminal liability any public official who "receives * * * anything of value personally for or because of any official act performed or to be performed by such official." The absence of any quid pro quo element in that text is demonstrated by contrast with the text of the general bribery statute, 18 U.S.C. 201(b)(2), which subjects a public official to prosecution if he "corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally * * * *in return for* * * * *being influenced in the performance of any official act*" (emphasis added). The latter provision, which carries a greater penalty, evidences Congress's ability—when it so desires—to require, as an element of an illegal receipt crime, proof of the recipient's agreement to perform an official act.

The courts of appeals that have decided the issue have uniformly held that, unlike the bribery statute, the gratuity statute contains no quid pro quo requirement. See *United States* v. *Brewster*, 506 F.2d 62, 72 (D.C. Cir. 1974); *United States* v. *Niederberger*, 580 F.2d 63, 68-69 (3d Cir. 1978); *United States* v. *Muldoon*, 931 F.2d 282, 287 (4th Cir. 1991); *United States* v. *Strand*, 574 F.2d 993, 995 & n.2 (9th Cir. 1978); *United States* v. *Johnson*, 621 F.2d 1073, 1076 (10th Cir. 1980). In *Standefer* v. *United States*, 447 U.S. 10, 14 n.8 (1980), this Court indicated its agreement with that interpretation, specifically approving jury instructions that did not require a finding of a quid pro quo to convict a donor of providing an unlawful gratuity, in violation of 18 U.S.C. 201(f) (1982). The court of appeals had noted, in that case, that the text of Section 201(f) mirrored that of

Section 201(g), and, having previously rejected the argument that Section 201(g) required proof of a quid pro quo, the court refused to read such a requirement into Section 201(f). See *United States* v. *Standefer*, 610 F.2d 1076, 1080 & n.8 (3d Cir. 1979) ("All that was required in order to convict Standefer was that the jury conclude that the gifts were given by him for or because of Niederberger's official position, and not solely for reasons of friendship or social purposes."). See also *Niederberger*, 580 F.2d at 68 n.10 (citing cases involving prosecutions under Section 201(f)).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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